STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Ameren Energy Marketing Company	)	
	)	
Report of Continuing Compliance With Standards for Certificate of Service Authority Under Section 16-115 of the Public Utilities Act	)	**Docket No. 03-0780**

LOCAL UNIONS 15, 51 AND 702, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO'S RESPONSE TO THE MOTION TO DISMISS THEIR COMPLAINT CHALLENGING AMEREN ENERGY MARKETING COMPANY'S REPORT OF CONTINUING COMPLIANCE WITH STANDARDS OF SERVICE AUTHORITY UNDER SECTION 16-115 OF THE PUBLIC UTILITIES ACT

COME NOW Local Unions 15, 51 and 702, International Brotherhood of Electrical Workers, AFL-CIO (the "Unions"), by their undersigned attorneys, and for their Response to the Motion to Dismiss their Complaint Challenging Ameren Energy Marketing Company's Report of Continuing Compliance with Standards of Service Authority Under Section 16-115 of the Public Utilities Act (the "IBEW Complaint" or the "Complaint") states as follows:

Introduction

1. Ameren Energy Marketing Company ("AEM") has filed a Motion to Dismiss the Unions' Complaint based on a grab bag of procedural and substantive assertions none of which, upon closer examination, should prevent the Commission from taking the steps that should result in a rejection of AEM's continuing as an alternative retail energy supplier ("ARES") in the Illinois marketplace.

2. AEM starts its Motion with the background or history of this case and similar ARES proceedings, and this history demonstrates that the Unions have standing

to file their Complaint; that the matter is ripe for a decision by the Illinois Commerce Commission (the "Commission") on the matters raised by the Union's Complaint; that the matter is not moot under the reciprocity clause of the Illinois Electric Service Customer Choice and Rate Relief Act 1997, 220 ILCS 5/16-101 et seq. (the "Customer Choice Law"); that the Complaint provides a sufficiently plain and concise statement of the things being done or sought to be done by AEM such that the Commission can act; that the Complaint cites authority on which the Commission can act; that the Unions have not waived their right to challenge AEM's recertification; and that the Unions' interpretation of the 1997 Act's reciprocity clause, 220 ILCS 5/16-115 (d)(5) is consistent with the purpose of that Act as interpreted by the courts and the Commission. Therefore, rather than dismissing the Union's Complaint, as sought by AEM, the Commission should correct its error in granting AEM's application to be certified as an ARES and use AEM's 2004 report of continuous compliance to determine if it meets the reciprocity standards of the Customer Choice Law.

3. AEM filed its first application to sell electricity and power to eligible non-residential retail customers with a maximum electric demand of one megawatt or greater in 2000, and the Commission entered its decision certifying AEM in *Ameren Energy Marketing Company,* Docket No. 00-0486 on August 15, 2000. AEM filed its second application to sell retail electricity and power to eligible non-residential retail customers with annual electrical consumption greater than 15,000 kwhs in 2002, and the Commission entered its Order granting certification to AEM on April 2, 2002.

4. At the time of the aforementioned decisions, the Commission utilized an analysis which held that, so long as electric power could not be physically and

economically delivered by the affected Illinois utilities to the service areas of the ARES applicant's affiliates, then the ARES had complied with the reciprocity clause in spite of the fact that the law of the jurisdiction in which the ARES affiliate was based barred competition from out of state utilities. (See Docket No. 00-0486, p. 6-7, 9).

5. During the same period that AEM filed applications for and had obtained certification as an ARES on two occasions from the Commission, several Illinois state legislators and then the Unions sought to intervene in the annual compliance report procedure followed by WPS Energy Systems, Inc. approximately one year after WPS had first been certified as an ARES.[1] Put very simply, the Unions contended that, pursuant to §16-115(d)(5), if an ARES applicant or an ARES applicant's corporate affiliate owned or controlled a public utility that delivered power to end users, the jurisdiction in which the affiliated utility was located had to permit access by the Illinois utility, in whose territory the applicant wished to compete, to end use customers in the affiliated utility's defined geographic service area. In response to the Motions to Intervene filed by the state legislators and the Unions, the Commission reopened the WPS ARES certification proceeding. (Docket No. 00-0199)

6. In May and June, 2001, the Commission rejected the Unions' interpretation of §16-115(d)(5) of the Customer Choice Act in *WPS Energy Systems, Inc,* Docket 00-0199 (May 9, 2001) and *Blackhawk Energy Systems, LLC*, 01-0174 (April 6, 2001) respectively after concluding that none of the Illinois utilities in whose

[1] During the same period in which the Unions sought and were permitted by the Commission to intervene in the WPS 2001 compliance procedure, they also sought and were permitted to intervene when Blackhawk Energy Services, LLC filed an application for ARES certification in Docket No. 01-0174.

territories WPS and Blackhawk wished to compete for end use customers could "economically" deliver electricity to customers in the territory of the public utilities with which WPS and Blackhawk were affiliated.

7. The IBEW appealed the Commission's decisions in *WPS Energy Systems, Inc.* and *Blackhawk Energy Systems, LLC* to the Appellate Court of Illinois, Fifth District. On June 20, 2002, in *Local Unions 15, 51 and 702, International Brotherhood of Electrical Workers v. Illinois Commerce Commission et al.* 331 Ill. App 3d 607, 772 N.E. 2d 340, 265 ILL. Dec. 302 (2002) (the *"IBEW"* decision), the Appellate Court reversed the Commission's previous ARES decisions that had held "that the reciprocity clause applies only if an ARES applicant or its affiliate owns a public utility to which electric power and energy can be physically and economically delivered by the Illinois utilities." 772 NE 2d at 345. In rejecting the Commission's interpretation of §16-115(d)(5), the Court stated;

> We agree with petitioners' arguments that the construction offered by WPS and the Commission would give a new entrant an opportunity to take an unreasonable advantage over the existing utilities, for it would allow a new entrant into the Illinois utility market without providing the Illinois utilities affected by the new entrant an opportunity to also compete in the market of the new entrant, hence allowing the new entrant to take an unreasonable advantage of the investments made by the formerly regulated industry,

772 N.E. 2d at 348. WPS filed for leave to appeal to the Illinois Supreme Court which denied both its petition for appeal as a matter of right or leave to appeal on October 2, 2002.

8. In short, both the Appellate Court decision and then the Illinois Supreme Court's denial of the petition to appeal came after the Commission had granted AEM's

applications for ARES certification utilizing a subsequently rejected interpretation of the reciprocity provision of the Customer Choice Law.

9. While the IBEW has attempted to follow the process of ARES applications following the *IBEW* decision, reports of continuing compliance are not formerly docketed and available on the Commission's E-docket and Local Union Nos. 15, 51 and 702 simply did not learn of the 2003 AEM Report of Continuing Compliance. Consequently any statements that AEM may have made in its 2003 Report of Continuing Compliance regarding its ARES certification being in accord with the *IBEW* decision were not available for normal public scrutiny through the Commission's Commission's E-docket. Further AEM's 2003 report of continuing compliance appears to have been filed and acted upon by the Commission before the Commission acted on the *WPS* and *Blackhawk* remands. Frankly it was only through informal word of mouth that the Unions learned of AEM's report in the present case and led to the their filing the present Complaint.

The Unions' Complaint States a Cause of Action and Should Not Be Dismissed

10. The Unions' Complaint states a cause of action with sufficient clarity for the Commission to decide whether to issue a notice for a hearing and then either issue an order granting or denying the relief requested in the Complaint. The Complaint is quite clear. The core of AEM's Motion to Dismiss focuses on ¶s 11-16 of the Unions' Complaint.

11. The essence of those paragraphs is essentially the following - the 2002 Commission decision in Docket No. 2002-0064 certifying AEM as an ARES in Illinois

preceded the *IBEW* decision which made the issue of whether the state in which the ARES utility or ARES utility affiliate is located is open to retail competition from out of state power providers determinative as to whether an ARES applicant can be certified to compete for end use customers in the territory of an Illinois utility.

12. The Complaint alleged that AEM is affiliated with a vertically integrated Missouri utility - Ameren UE - that is headquartered in St. Louis, Missouri.

13. At ¶14, the Complaint continued that, at the time of AEM's application for certification and continuing to the present, the state of Missouri has not opened its borders to retail competition from non-Missouri power producers or energy traders.

14. The Complaint at ¶15 pointed to a more recent Commission decision in which a power producer with all of its production capacity located within Illinois, which arguably could be a point made by AEM regarding a major source of the power it wishes to sell to end users in the Illinois' retail electric power consumption market, was denied ARES certification when the Commission found that the Illinois based power producer was affiliated with a Southern California utility with a capped and very limited pool of end users to whom Illinois utilities could sell power.

15. In ¶s16 and 17 of the Complaint, the Unions stated that, based on both the *IBEW* decision and the Commission's more recent Order in *Midwest Generation Energy Services, LLC*, Docket NO. 02-0740 (*"MGES"*), the Commission erred in granting ARES certification to AEM and that, based on these decisions, AEM does not meet the reciprocity standards of Section 16-115(d)(5).

16. Then, in its prayer, the Complaint requested that the staff, if appropriate, and/or the Commission enter an Order rejecting Ameren's claim of compliance or, in

the alternative, hold a hearing in which the issue of Ameren's compliance with the reciprocity law be considered.

17. The cases cited by AEM simply stand for the proposition that, in Illinois general civil actions, a plaintiff must allege facts that "are sufficient to bring his claim within the scope of a legally recognized cause of action," *Teter v. Clemens,* 112 Ill. 2d 252, 97 Ill. Dec. 467, 492 N.E. 2d 1340, 1342 (1986) and *Ray Dancer, Inc. v. DMC Corp*., 230 Ill. App. 3d 40, 171 Ill. Dec. 824, 594 N.E. 2d 1344 ,1350 (2nd 1992) and, that, in a malicious prosecution claim, a plaintiff must allege specific facts of a special injury rather than mere conclusions as to the plaintiff's state of mind, *Levin v. King,* 271 Ill. App. 3d 728, 208 Ill. Dec. 186, 648 N.E. 2d 1108, 1114 (1st 1995).

18. Section 200.170 ©) of the Commission's Rules of Practice provides that a "formal complaint" shall include a "plain and concise statement of each complainant's interest and the acts or things . . . claimed to be in violation, of any statute, or of any order or rule of the Commission." The Unions' Complaint in the present case clearly identifies the acts done which it contends violate the Act. It asserts that permitting AEM to continue as an ARES by approving its Report of Continuing Compliance would violate both a statute, Section 16-115(d)(5), as interpreted by the court in *IBEW,* and an order of the Commission in *MGES.* Whether the fact that Illinois utilities cannot compete for end use customers in the state of Missouri or that arguably the size and scope of customers in AEM's Illinois utility affiliate's territory is not reasonably comparable to the size and scope of end users that AEM wants to compete for as an ARES constitute sufficient grounds to reject AEM's Report of Continuing Compliance in

light of the above mentioned decisions is not a matter to be decided by a Motion to Dismiss. Rather, because so many of the facts underlying the Unions' Complaint are not in dispute, the Commission should either permit the parties in this case to determine if the matter could be presented for decision on stipulated facts or, in the alternative, set the matter down for the taking of testimony.

The Unions Have Standing To Bring this Action

19. AEM has asserted that Local Unions 15, 51 and 702 lack standing to bring this action, because they have failed to demonstrate that, in their representational capacity, they "have a real interest in the action brought and its outcome," "a recognizable interest in the dispute peculiar to" themselves "and capable of being affected," or that they would be "directly injured" by a Commission Order approving AEM's Report of Continuing Compliance.

20. The Commission's is bound by significantly broader rules of standing than are Illinois courts, and therefore the cases cited by AEM to preclude the Commission from considering the Unions' Complaint are irrelevant to this proceeding.

21 Section 2-209.1 of the Code of Civil Procedure, 735 ILCS 5/2-209.1, defines a "voluntary unincorporated association" as "any organization of 2 or more individuals formed for a common purpose . . ." and permits such associations to "sue and be sued in their own name, and may complain and defend in all actions." Local Unions 15, 51 and 702 are unincorporated associations acting on behalf of the members who compose them. *American Federation of Technical Engineers, Local 144 v. La Jeunesse,* 63 Ill. 2d 263, 347 N.E. 2d 712, 714 (1976).

22. Section 10-108 of the Public Utilities Act (the "Act") provides in part; "

> "Complaint may be made by the Commission, of its own motion or by any person or corporation, chamber of commerce, board of trade, or any industrial, commercial, mercantile, agricultural or manufacturing society, or any body politic or municipal corporation by petition or complaint in writing setting forth any act . . . claimed to be in violation of this Act, or of any order or rule of the Commission."

220 ILCS 5/10-108.

23. Section 200.40 of the Commission's Rules of Practice defines a "party" before the Commission as "any person who initiates a Commission proceeding by filing an application, complaint or petition with the Commission" and "may an applicant, complainant intervener petitioner or respondent." According to Section 200.40, a "complainant" is a "person who complains to the Commission by formal written complaint . . . " Further, Section 200.40 defines a person as "any individual, partnership, corporation, governmental body or unincorporated association."

23. Because Local Unions 15, 51 and 702 are unincorporated associations with the right to sue and be sued on behalf of their individual members, both state law and the Commission's own rules permit them to file Complaints dealing with alleged violations of the Act.

24. Section 10-108 of the Act also provides that the Commission shall not dismiss any complaint "because of the absence of direct damage to the complainant." Therefore Local Unions 15, 51 and 702 may file their Complaint with the Commission as unincorporated associations on behalf of their members whether or not they or their members have sustained or will sustain direct damage due to AEM's continuing as an ARES in Illinois. *Illinois Telephone Association v. Illinois Commerce Commission*, 67 Ill

2d 15, 7 Ill. Dec.76, 364 N.E. 2d 63, 65 (1977). The cases cited by AEM, which arise out of proceedings in Illinois circuit courts, are distinguishable in that they apply the standing rules applicable to general civil actions and not the particular statutory and administrative rules governing proceedings before the Commission. *Cable Television and Communications Ass'n of Illinois v. Ameritech Corp.*, 288 Ill. App. 3d 354, 223 Ill. Dec. 712, 680 N.E. 2d 445, 449 (2nd 1997).

The Matter of whether AEM Meets the Reciprocity Clause Is Not Moot

25. AEM asserts that the Commission should dismiss the Unions' Complaint as being moot, because the "relief being sought by the Unions in this case is ineffectual for the complaining party." *In re a Minor v. The Daily Journal of Kankakee*, 127 2d 247, 130 Ill. Dec. 225, 537 N.E. 2d 292, 295 (1989). The facts in *In re a Minor v. The Daily Journal of Kankakee* demonstrate that, while there are circumstances in which a case may be moot, neither that particular case nor the present proceeding were and are moot.

26. I*n In re a Minor v. The Daily Journal of Kankakee,* the Supreme Court considered the appeal of a newspaper from an order of a circuit court barring it from publishing the name of a minor involved in a juvenile proceeding about which the newspaper had learned from a source outside of the proceeding. Responding to the State's claim that the injunction issued against the newspaper was moot due to the ending of the juvenile proceedings, the Court noted that the newspaper was still subject to the trial court's orders even after the conclusion of the case against the minor. Even more relevant to the present case, the Court noted that there is a "public interest"

exception to the mootness rule that is based on three criteria - (a) “the public nature of the question,” (b)” the desirability of an authoritative determination for the purpose of guiding public officers,” and ©) “the likelihood that the question will generally occur.” 537 N.E. 2d at 296. In the present case, the application of the reciprocity clause of the Customer Choice act is of significant interest to the parties to this case, to other Illinois utilities, to the legislature, to other potential ARES applicants and to the Commission charged with enforcement of the reciprocity clause. The affected parties - other utilities, other ARES applicants, the courts and employees and end use customers through out Illinois - need guidance from the Commission as to the proper application of the reciprocity clause to facts like those presented by AEM. Finally it is likely that questions that are the same or similar to those in this case will recur in the future.

27. AEM contends, that, because “there are Ameren Corporation subsidiaries willing and able to step into its role and sell electricity at retail to the same customers . . . outside their service territories,” the harm the Unions complain of due to AEM “selling electricity at retail in Illinois, cannot and will not be avoided.” While this may be true, the right of these Ameren subsidiaries to sell electricity in Illinois outside of their service areas arises under Section 16-116(a) of the Customer Choice Law, 220 ILCS 5/16-116(a), in which there is no duty by the Commission to consider the openness of a ARES affiliate’s defined geographic area located outside of Illinois to competition by an Illinois utility in whose service area the ARES wishes to compete for retail customers. Section 16-116(a) does not require reciprocity consideration, because it makes clear that any electric utility with tariffs on file with the Commission “may provide electric power and energy to one or more retail customers located outside of its service area

. . . " In short reciprocity is part and parcel of the statute permitting intra-Illinois competition by Illinois utilities for end use customers outside of their service areas. Therefore, should AEM's holding company, Ameren Corporation wish to compete for end use customers outside of its Illinois utilities' service areas, the Unions submit that following the *IBEW* and *MGES* decisions, it is limited to proceeding directly through those utilities and not through an ARES.

28. Further, Section 10-108 of the Act provides at the end of its second paragraph that the "Commission shall have the authority to hear and investigate any complaint notwithstanding the fact that the person or corporation complained of may have satisfied the complaint." This clause appears to provide that, even if a corporation such as Ameren may be structured such that it can satisfy the Complaint by solely utilizing its Illinois utility subsidiaries, its decision to proceed as an ARES still requires an investigation and hearing.

The Unions Have Not Waived Their Right To Bring this Action

29. AEM's claim that the Unions have waived their right to challenge AEM's recertification by falling asleep at the switch while AEM was expending time and resources building up an its contracts with retail customers throughout Illinois is belied by the history of the *IBEW* decision and the remand of the two ARES applicants' whose requests for certification were considered in the *IBEW.*[2]

30. The Appellate Court, 5th District filed its *IBEW* decision on June 20, 2002,

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[2] In fact, Blackhawk Energy Services, L.L.C.'s ARES application was directly considered by the Appellate Court and the Commission's Order granting Blackhawk certification was reversed and remanded by the Court in an unreported Summary Order entered on January 31, 2003 in Docket 5-01-0860 based entirely on the Court's earlier *IBEW* decision..

after which WPS Energy Systems, Inc. whose ARES certification was the specific matter being reviewed by the Appellate Court, sought review of the decision by the Illinois Supreme Court. On October 2, 2002, the Supreme Court denied both the petition for appeal as a matter of right and leave to appeal that had been filed by WPS. The Appellate Court then issued its mandate reversing the Commission and remanding WPS' application to the Commission for further proceedings on October 31, 2002. The Commission held a prehearing conference on December 5, 2002 setting a remand schedule. On December 27, 2002, WPS filed a "Motion to Terminate and Dismiss Proceedings" voluntarily surrendering its ARES Certification. Then on January 23, 2003, the Commission granted WPS' Motion and cancelled the Certification previously awarded to WPS. In short, it appears that the Commission did not complete its actions on the remand of WPS' application for certification until after AEM submitted its 2003 Report of Continuing Compliance.

31. The Appellate Court, 5th District did not enter its Summary Order reversing the Commission's grant of ARES certification to Blackhawk Energy Services, L.L.C. until January 31, 2003. Following the Appellate Court's remand, the Commission adopted a schedule for submission of testimony. Based on the testimony submitted and the positions of the parties, the Commission entered an order granting Blackhawk's application for ARES certification on September 9, 2003 well after AEM had submitted its 2003 Report of Continuing Compliance.

32. The Unions submit that, until all issues were resolved in the WPS and Blackhawk application for ARES certification proceedings, including the remands of those cases to the Commission and Commission action on those remands, the Unions

did not act unreasonably in not taking action in other ARES proceedings such as earlier AEM Reports of Continuing Compliance.

33. Following the Commission's actions in the remands from the *IBEW* decisions, the Unions submit that AEM was on notice that it was subject to having its ARES certification challenged by the Unions or other parties and, to the extent, those parties acted within a reasonable period after the Commission's decisions on remand, AEM continued to expand its marketing to retail customers in the service areas of other Illinois utilities at its peril.

The Unions' Complaint Complies with the Commission's Rules of Practice

34. AEM contends that the Unions have cited to the wrong statutory complaint procedure and that the statute providing for complaints challenging ARES certifications is only available to the Commission. AEM is wrong.

35. AEM claims that, pursuant to Section 16-115B(b) of the Customer Choice Act, 220 ILCS 5/16-115B(b), any complaint to be filed can only be brought by the Commission. AEM ignores the clear language of Section 16-115B(b) which states, "The Commission shall have authority, after notice and hearing held on complaint or on the Commission's own motion . . . to revoke or suspend the certification of service authority of an alternative retail electric supplier for substantial or repeated violations of or non-conformances with the provisions of Section 16-115 . . ."

36. Read in their totality, Section 10-108, correctly cited by the Unions, provides in part; "Complaints . . . may be made . . . by any person . . . setting forth any act . . . claimed to be in violation of this Act or of any order . . . of the Commission" and Section 16-115B(b) provides that the Commission may act against a previously certified

ARES on a complaint filed by a third party, pursuant to Section 10-108, after notice and hearing, The cases cited by AEM do not detract from this reasonable reading of the Commission's authority to act on third party complaints challenging a prior ARES certification.

The Unions' Complaint Submits Prayers for Relief in the Alternative

37. There is nothing inappropriate in the Unions' submitting alternative prayers for relief. Both were clearly understood by AEM and presumably will also be understood by the Commission and its staff.

38. In its prayer for relief, the Unions first requested that the Commission reject AEM's ARES certification for lack of compliance with Section 16-115(d)(5). Alternatively, the Unions at ¶8 of their Complaint and again in their Prayer for Relief requested that the Commission set this matter down for hearing, allow the Unions to intervene in that proceeding, and require the submission of evidence by AEM in support of its continuing as an ARES. Implicit in the Unions' Prayer for Relief is that, after such a hearing, they would then seek to persuade Commission to revoke AEM's ARES certification.

39. This case now has a docket number - Case No. 03-0780 - in which, if the Commission granted a hearing, the Unions could then intervene.

The Unions' Complaint Is Ripe for the Commission's Consideration

40. AEM attempts to have it several ways - asserting in one section of its Motion to Dismiss that the Unions' Complaint is moot and will simply require AEM to achieve its ends through another mechanism, in another section that the Unions'

Complain was untimely filed and will prejudice both AEM and its customers, and in the present section that its Complaint is not ripe.

41. The Unions submit the dispute they have with AEM is not an abstract disagreement and, that through this Response to AEM's Motion and through the hearing process, the necessary information should be adduced upon which the Commission can determine whether the Unions' allegations are meritorious and AEM's ARES certification revoked or the contrary.

The Unions Cited to the Correct Statutory Authority

42. The Unions correctly relied on Section 10-108 of the Act for their right to bring the present action. Section 16-115B(a) of the Customer Choice Law, 220 ILCS 5/16-115B(a), cited by AEM as the only basis on which the Commission can act against an ARES, states, "The Commission shall have jurisdiction in accordance with the provisions of Article X of this Act [220 ILCS 5/101 et seq.] to entertain and dispose of any complaint against any alternative retail electric supplier . . ."

43. Section 10-108 of the Act is part of the "et seq." of Article X, and therefore the Unions have correctly stated the basis on which the Commission can act.

There Is No Legal Deficiency with the Unions' Complaint

44. The Unions' Complaint asserted, in part, that the fact that one of AEM's affiliates is Ameren UE, which is based in Missouri, produces most its power in Missouri and markets almost exclusively to Missouri end use customers to whom Illinois utilities cannot market when AEM would be permitted to compete for end use customers outside of "the Ameren control area" violates Section 16-115(d)(5) of the Customer

Choice Act as interpreted in the *IBEW* decision.

45. AEM responds correctly on the facts, but irrelevantly in terms of the application of Section 16-115(d)(5), that the "other Illinois utilities" can already physically and economically deliver power and energy over transmission and distribution facilities owned by the "Ameren Companies" to end use customers in the Ameren control group's Illinois "defined geographic area. While the Unions don't dispute this fact, the authority for Illinois electric utilities to deliver electrical power outside of their service areas to end use customers in defined geographic areas served by other Illinois is Section 16-116 of the Customer Choice Act and not Section 16-115 pursuant to which a market has been created in Illinois for a multiplicity of power and service providers under certain rules without regard to whether they are utilities. If Ameren Companies wish to sell power to end customers in the territory of other Illinois utilities, they can proceed without objection from the Unions so long as they do so consistent with the provisions of the Customer Choice Act and not by twisting the reciprocity clause of that statute.

46. AEM asserts that there are currently four suppliers, other than AEM, authorized to retail electricity to end users in Ameren's Illinois control area - MidAmerican Energy Company, EnerStar, Constellation New Energy and Ameren CILCO. Both Ameren CILCO and MidAmerican, which presumably is, or will soon be, part of the Ameren control group, are participating in the ARES market pursuant to Section 16-116 of the Customer Choice law, and therefore their entry into the defined geographic territory of Ameren's Illinois control area is irrelevant to the issues raised by this Complaint which deals with AEM's affiliation with an electric utility based outside of

Illinois in whose territory Illinois electric utilities cannot compete for end use customers.

47. EnerStar is a rural electric cooperative based in Paris, Illinois that has decided to compete as an ARES and, in doing so, has opened up its own territory of five eastern Illinois rural counties to competition for end use customers by other certified ARES or Illinois public utilities who are permitted by Section 16-116 of the Customer Choice law to sell electricity and energy outside of their own service areas. (See Commission Docket No. 00-0030 and EnerStar's web site accessible through the Commission's web site and its list of energy companies certified as alternative retail electric suppliers). The fact that EnerStar has been authorized to compete for retail customers in Ameren's Illinois control areas does not advance the claim that AEM should be certified as an ARES in Illinois.

48. Constellation New Energy is an ARES that has met the requirements of Section 16-115(d)(5), and therefore the Commission's Order in Docket No. 03-0325 granting it ARES status is distinguishable from the facts of this case and demonstrates why AEM's Report of Continuing Compliance should be rejected by the Commission. In granting Constellation New Energy's application for ARES certification, the Commission's Order showed how Illinois utilities could deliver power to retail customers in the geographic area served by Constellation's utility affiliate, Baltimore Gas and Electric ("BGE"), through the Midwest Independent Transmission System Organization ("MISO") that serves the Midwest to the PJM Interconnection, L.L.C. ("PJM") the transmission grid for the Northeast. Further the Commission's Order pointed to the fact that Maryland, unlike Missouri, where AEM's largest affiliate is located, "passed its Electric Restructuring Act" in "April 1999" which "provides for retail choice for Maryland

consumers as well as standard offer service for customers that do not opt for choice." The Order noted that BGE had entered into a settlement with the Maryland Public Service Commission requiring retail choice for all of its customer as of July 1, 2000.

49. Finally AEM points to the Commission's Order in the remand by the Appellate Court of *Blackhawk Energy Services, L.L.C. ("Blackhawk")*, Docket No, 01-0174). Basically, AEM points to the fact that Blackhawk is affiliated with utilities in both Michigan and Wisconsin and that, at the present time, Wisconsin, like Missouri, does not permit out of state power providers to sell electricity to end use customers withing its borders. However, the Commission's *Blackhawk* Order made clear that, Michigan, the other state in which Blackhawk had utility affiliates in June 2000, "had passed its Electric Restructuring Act that provides for retail choice for Michigan consumers as well as standard offer service for customers that do not opt for choice." (Docket No. 01-0174, p. 4). Further the same Order noted that Illinois utilities and their affiliates could be certified as a competitive electric suppliers throughout the state of Michigan and that "at the time that the Michigan market opened to retail choice, there were slightly more than 4 million retail electric customers of investor-owned utilities in Michigan." (Docket No. 01-0174, p. 4-5). The Order went on to pointed out that "both ComEd and IP are currently licensed as Alternative Electric Suppliers ("AES") to serve retail electric customers in Michigan . . . " and that "ComEd is its (Blackhawk's) principal source of electricity, as that term is defined in Section 16-115(d)(5) of the Act."

50. In short the facts in *Blackhawk* lend little support to AEM's assertion that its Report of Continuing Compliance actually shows compliance with the reciprocity provision of the Customer Choice Act. Unlike Michigan which has opened itself up to

competition for end use customers of its investor owned utilities, not just in the Michigan markets of Wisconsin Electric Power Company and Edison Sault Electric Company - the affiliates of Blackhawk - but throughout the state, Missouri continues to close its borders to entry by non-state power providers seeking to compete for end use consumers of electricity.

51. The fact that Illinois electric utilities may enter the territory in Illinois served by Ameren companies pursuant to Section 16-116 of the Act does not create a legal justification for AEM to participate in the Illinois end use electric consumer marketplace so long as it retains its affiliation with Ameren UE, the vast majority of whose customer base resides or does business in a fully regulated and closed state.

52. The Unions' interpretation of the reciprocity clause is fully consistent with the way in which that clause was construed in the *IBEW* case and an Order sustaining the Unions' position will not impede competition in Illinois, but only ensure that those ARES applicants wishing to slice into the markets of Illinois utilities and their affiliated power generators must comply with the letter of the law.

WHEREFORE, based on the foregoing arguments, the Unions respectfully request that the Commission deny AEM's Motion to Dismiss and either reject AEM's Report of Continuing Compliance based on the pleadings and admissions to date or set this matter down for a hearing in which AEM would be required to submit evidence in support of its alleged compliance with the reciprocity clause of the Customer Choice Law.

Respectfully submitted,

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Certificate of Service

_____The undersigned certifies that the Local Unions 15, 51 and 702, IBEW's Response to the Motion to Dismiss their Complaint Challenging Ameren Energy Marketing Company's Report of Continuing Compliance with Standards of Service Authority Under Section 16-115 of the Public Utilities Act in this proceeding was E-filed this 31st day of March, 2004, by E-Docket to:

Elizabeth A. Rolando
Chief Clerk
Illinois Commerce Commission
527 East Capitol Avenue
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and a copy of same was mailed this 31st day of March 2004, by First Class Mail to:

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